



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 171 OF 2014

1. SHAKILA BEGUM ALI (as personal representative of the Estate of the late

MEHBOOB MOHAMED ABDUL GAFOOR MOHAMED MULAH also known as

MEHBOOB MOHAMED ABDULGAFOOR and MEHBOOB MULLAH)....PLAINTIFF

-VERSUS-

1. VESCON PROPERTIES LIMITED

2. REGISTRAR OF TITLES.....DEFENDANTS

RULING

1. The application for determination is the Notice of Motion dated 6th December, 2019 in which the plaintiff/applicant seeks leave of this court to appeal to the court of appeal against the ruling and orders of Matheka, J issued on 1st November, 2018 and for extension of time to file a notice of appeal from the said orders and ruling. The application is premised on the grounds inter alia, that this suit was dismissed for want of prosecution on 1st November, 2018 by Matheka, J during the service week. That the same was dismissed despite it having been explained to the court that the plaintiff's erstwhile advocates never prosecuted the matter while they had been assuring the plaintiff that the matter was ongoing. That the plaintiff appointed the current advocates to take over the matter and proceed to prosecute the same in a regular manner. It is averred that the learned judge shrugged off those explanations and proceeded to dismiss the suit. That upon the said dismissal, the plaintiff rather than appeal within the timelines set by law, filed an application dated 22nd November, 2018 seeking to reinstate the suit but that application was dismissed on 28th November, 2019 for the reasons that the court was functus officio. The plaintiff contends that the court has wide and unfettered discretion to allow the application herein, adding that the defendants shall not suffer any prejudice should the application be allowed.

2. In opposing the application, the 1st defendant filed a replying affidavit sworn on 6th February, 2020 by Praful Velji Halai, a director of the 1st defendant. It is the 1st defendant's contention that the application lacks merit and should be dismissed with costs. It is deposed that the suit was dismissed for want of prosecution on 1st November, 2018 because the plaintiff failed to show cause why it could not be dismissed. That subsequent to the dismissal of the suit, the plaintiff filed an application seeking to reinstate the suit which application was dismissed by this court on 28th November, 2018. The 1st defendant contends that this application is vexatious, frivolous, bad in law and therefore an abuse of the court process. The 1st defendant argues that this court lacks jurisdiction to extend time to the applicant to appeal to the Court of Appeal as such power is only vested in the court of Appeal. Further, that it is only the Court of Appeal which has powers to admit notice of appeal out of time, and that this court having pronounced itself is functus officio. That after filing the application to reinstate the suit, the plaintiff is estopped from appealing against the order of 1st November, 2018 and can only appeal against this court's decision which dismissed the application of reinstatement.

3. The application was canvassed by way of written submissions. The plaintiff filed submissions on 13th October 2020 in which it was submitted that Order 17 is not amongst the orders from which an appeal lies as of right and therefore as per order 43 (2), the appeal can only lie upon the court granting leave to appeal. It was submitted that given the nature of the suit and the effect of the dismissal without considering the matter on merit, the plaintiff stands to lose the parcel of land in dispute. The plaintiff urged the court to grant her leave to appeal.

4. As regards an order for enlargement of time to file a notice of appeal, the plaintiff cited Section 7 of the Appellate Jurisdiction Act which vests the court with the residual powers and jurisdiction to extend time to file a notice of Appeal to the court of Appeal beyond the 14 days period permitted by the Court of Appeal Rules. The plaintiff relied on the case of **Edward Njane Nganga & Another –v- Damaris Wanjiru Kamau & Another (2016)eKLR**. It was the plaintiff's submission that putting the competing interests of the plaintiff and the defendants on a balancing scale of justice, the plaintiff's interests outweighs that of the defendants as the plaintiff stand to lose more than the

defendant.

5. The 1st defendants filed their submissions on 1st October, 2020. It was submitted that when this court dismissed the application dated 22nd November 2018 the plaintiff's Advocates prayed for leave to appeal against the order of dismissal and the court granted the plaintiff leave to appeal against the order of 28th November 2019. It was the 1st defendant's submission that it is quite illogical for the plaintiff to come back again to this court to pray for leave to appeal against the order of 1st November, 2018. The 1st defendant submitted that this court lacks jurisdiction to entertain the application for being functus officio. The 1st defendant relied on the case of **Telkom Kenya Limited –v- John Ochanda (suing on His own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)(2014)eKLR** and **Raila Odinga & 2 Others –v- IEBC & 3 Others (2013)eKLR**. The 1st defendant further submitted that the principle of estopped bars the plaintiff from challenging the decision of 1st November, 2018 and to do so is an abuse of the court process. This is because after the suit was dismissed for want of prosecution on 1st November, 2018, the plaintiff opted to file an application to reinstate the suit which application was also dismissed on 28th November 2019 and the court granted the plaintiff leave to appeal against that order. The 1st defendant relied on the case of **Richard Muthusi –v- Patrick Gituma Ngomo & Another (2017)eKLR** and **Nancy Musili –v- Joyce Mbete Katsi (2020)eKLR**.

6. I have considered the application and the submissions made. The first issue for determination is whether this court should grant the plaintiff leave to appeal to the Court of Appeal against the ruling and orders of Matheka, J issued on 1st November, 2018. The second issue for determination is whether the court should grant the plaintiff an extension of time to file a notice of appeal from the orders and ruling of Matheka J issued on 1st November 2018.

7. This suit was dismissed on 1st November, 2018 for want of prosecution by Matheka, J who found that the reasons for the delay given by the plaintiff's counsel during the notice to show cause hearing were not sufficient. The advocate for the plaintiff was present in court on 1st November, 2018 when the order of the court was made. Order 43 Rule 1(3) of the Civil Procedure Rules provides as follows:

“(3) An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the orders is made, or within fourteen days from the date of such order.”

8. In this case, the advocate for the plaintiff was present in court on 1st November, 2018. He did not make an oral application at the time the order was made. Further, no application for leave to appeal was made within fourteen days from the date the order was made as required by the provisions of Order 43 Rule 1(3) cited above. The plaintiff only filed the present application on 6th December, 2019 which is a period of more than one year from the time the orders was made. I have perused the affidavit in support of the application. I find that there is no explanation given by the applicant as to why she was unable to make the application within reasonable time. In my view, delay for a period of over one year is inordinate and required sufficient explanation. The plaintiff has instead explained that instead of making the present application, she filed an application to reinstate the suit which was dismissed on 28th November, 2019. It therefore follows that the present application has been brought as an afterthought. I am therefore not persuaded to exercise my discretion in the applicant's favour by granting leave to appeal.

9. The other issue for determination is whether or not the court should grant the plaintiff an extension of time to file a notice of appeal against the orders and ruling of Matheka, J issued on 1st November, 2018. The plaintiff relied among others the case of Edward Njane Nganga (supra) where Waithaka J faced with a similar application quoted Munyao, J extensively in the case of **Loise Chemtai Ngurule & Another –v- Winfred Leshwari Kimung'en & 2 Others (2015) eKLR**. In the cited case Munyao, J stated by citing Section 7 of the Appellate Jurisdiction Act Cap 9 drawn as follows:

“5.7 Power of High Court to Extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence. ”

10. Going by the above provision of law, I do agree that this court has jurisdiction to entertain the present application in so far as it seeks extension of time to lodge a notice of appeal out of time. However, the question that arises is whether the applicant has satisfied the court to grant the order for extension of time.

11. In the case of **Stanley Kahoro Mwangi & 2 Others – Kanyamwi Trading Company Limited (2015) eKLR**, the Court of Appeal laid down principles that guide a court in considering an application for extension of time and stated thus:

“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is therefore, upon an applicant under this rule to explain to the satisfaction of the court that he is entitled to the discretion being exercised in his favour.....”

12. Whereas the matters to be considered are not exhaustive and considering that each case has to be decided on its unique circumstance, it is clear that a plausible and satisfactory explanation for delay must be given for the court to exercise its discretion in favour of an applicant. There has to be valid and clear reasons upon which discretion can be favourably exercised.

13. In the present case, I note that in the affidavit in support of the application, the plaintiff has deposed that rather than appealing within the

timelines set by the law, she instead made an application to reinstate the suit instead of appealing. However, it is trite that ignorance of the law is no defence. Moreover, in this case the applicant was represented by counsel all through the proceedings. I find that no valid reason has been offered for the delay in filing an appeal. I find that the explanation given is not plausible. In the circumstances, I am not persuaded to exercise my discretion in the applicant's favour. In any event, the application herein was not made timeously and explanation for the delay ought to have been given.

14. In the circumstances, and for the reasons I have given above, I find that the application is without merit. The notice of motion dated 6th December, 2019 is dismissed with costs to the 1st defendant.

15. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 16th day of November, 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE